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In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 357

NATIONAL BANK OF COMMERCE OF SAN ANTONIO, INDEPENDENT EXECUTOR OF THE ESTATE OF W. G. HIGGINS, DECEASED, PETITIONER

v.

FRANK SCOFIELD, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 302-313) is not reported. The opinion of the Court of Appeals (R. 322-329) is reported at 169 F. 2d 145.

JURISDICTION

The judgment of the Court of Appeals was entered July 21, 1948. (R. 329.) The petition for certiorari was filed October 18, 1948. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether charitable bequests in the remainder of a testamentary trust are deductible for federal estate tax purposes under Section 812 (d) of the Internal Revenue Code and the applicable Treasury Regulations, where the trustee is empowered in its sole discretion to invade the corpus in order to "liberally provide" for his widow during her lifetime, maintain her in "a location of her choosing", and provide her with "the necessities and comforts in life to which she is accustomed".

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * *

(d) [As amended by Section 408 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and by Section 511 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers (including the interests which fall into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return or, in the case of a decedent dying on or before October 21, 1942,

if the disclaimer is made prior to September 1, 1944), to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *.

* * * * *

(26 U.S.C. 1946 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.44. *Transfers for public, charitable, religious, etc., uses.*— * * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *

SEC. 81.46. *Conditional bequests.*— * * *

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

STATEMENT

The material facts as found by the District Court (R. 306-312) may be summarized as follows:

W. G. Higgins, the testator, died in 1943. He bequeathed all of his property, owned in community with his wife, in trust, and directed the trustee to pay \$50 monthly to his sister and \$200 monthly to his niece during their respective lives out of income and, if necessary, out of corpus. (R. 306-307.) The will further directed that (R. 307-308)—

My said trustee shall liberally provide for my beloved wife, Mary J. Higgins, maintaining her in our home or a location of her choosing, provided with the necessities and comforts in life to which she is accustomed; and my trustee may use such reasonable sums from the principal from time to time as it, in its sole discretion, may deem necessary for the carrying out of the provisions of this paragraph, so long as she may live.

Upon the death of the sister, niece, and widow, the trustee was to pay the "remainder" in equal shares to two named charities. (R. 308.) The value of decedent's one-half community interest in the property bequeathed in trust did not exceed \$57,000, and the income from the entire community estate amounted to approximately \$620 per month. At the time of decedent's death his widow was 82 years old, and expenditures for her maintenance amounted to about \$320 per month. (R. 310-311.)

In the federal estate tax return the executor-trustee sought to deduct from the taxable estate \$30,858.10 as

the value of charitable bequests. The deduction was disallowed by the Commissioner, the resultant deficiency was paid, and a claim and suit for refund followed. (R. 308-309.)

The District Court held that the invasionary power granted to the trustee precluded valuation of the charitable remainder by any reliable standards, and denied the claimed deduction. (R. 312-314.) The Court of Appeals affirmed. (R. 329.)

ARGUMENT

1. The question here is the same as that resolved in *Merchants Bank v. Commissioner*, 320 U. S. 256, and the decision below is in complete accord with this Court's holding in that case. There the decedent authorized his trustee to invade a charitable remainder for the "comfort, support, maintenance, and/or happiness" of his widow, and this Court held that the bequest to charity was not deductible because the extent to which it might be invaded was not susceptible of reliable measurement by objective standards. In so holding it approved the applicable Treasury Regulations, *supra*, which provide that a charitable bequest is deductible only insofar as it has a "presently ascertainable" value at the testator's death, and is exempt from the exercise of a power to divert it to a private use.

In the instant case the decedent's will likewise furnished no reliable criteria for ascertaining the value of the charitable bequests. He directed his trustee to encroach upon the charitable remainder in order to maintain his widow in "our home or a location of her

choosing", and to provide her with "the necessities and comforts in life to which she is accustomed". The trustee was further instructed to provide "liberally" for her and to use such reasonable sums as "in its sole discretion" it might deem necessary. (R. 307-308.)¹ These provisions rendered it impossible to ascertain as of the testator's death how much would be left for charity. Here, as in the *Merchants Bank* case (p. 263), the invasionary power "brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial". In keeping with the rule of the *Merchants Bank* case, the court below properly affirmed the District Court's disallowance of the claimed deduction. Its decision is also in accord with *Industrial Trust Co. v. Commissioner*, 151 F. 2d 592 (C.C.A. 1st), certiorari denied, 327 U. S. 788; *De Castro's Estate v. Commissioner*, 155 F. 2d 254 (C.C.A. 2d), certiorari denied, 329 U. S. 727; and *Newton Trust Co. v. Commissioner*, 160 F. 2d 175 (C.C.A. 1st).

2. The question here presented is also involved in *Henslee v. Union Planters National Bank & Trust Co.*, No. 90. There the District Court followed this Court's holding in the *Merchants Bank* case but the Court of Appeals refused to accept it as controlling and reversed the District Court. The case called for further review because, as alleged in the Government's petition for cer-

¹ The trustee was also authorized to invade the trust corpus, if necessary, to pay fixed sums to the testator's sister and niece during their respective lives. (R. 306-307.)

tiorari, if the decision of the Court of Appeals were permitted to stand it would seriously undermine this Court's ruling in the *Merchants Bank* case. Here both courts below have adhered to the *Merchants Bank* decision, and there is no more occasion for further review of this case than of similar cases (*Industrial Trust Co. v. Commissioner, supra*; *De Castro's Estate v. Commissioner, supra*) in which certiorari has been denied.

CONCLUSION

The decision below is in accord with the decision of this Court in the *Merchants Bank* case. There is no occasion for further review. The petition for a writ of certiorari should be denied.

Respectfully, submitted,

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NOVEMBER, 1948